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JOHN T. FEY, C

No. 949

IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

MONOLITH PORTLAND MIDWEST COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETITIONERS' REPLY BRIEF

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Petitioner comes now and replies to respondents' Brief in Opposition as follows:

The Contract Settlement Act was designed to speedily discharge the Government's obligation to contractors whose contracts were terminated for the convenience of the Government. Congress directed "fair compensation" be paid. The present petition for

certiorari clearly and simply presents the question of what is compensation.

These basic facts are clouded by respondent's brief, which understandably deals in generalities, and never reaches the merits of the action.

In such an action, where the Government has solemnly by contract and statute pledged itself to pay compensation justly due, a scrupulously fair statement of the facts material to this Court's determination is required. Respondent's Brief is deficient in this regard. Whether such lapse is inadvertent is unimportant.[1] It is necessary to at least correct statements made concerning the word "claims", to avoid the contractual integrity of the Government being further impaired.

Respondent's brief ignores the facts of the case, including the Bureau of Mines' beneficial use of petitioner's process and plant, raised in the petition (pp. 20-23), after Petitioner's rights had been appropriated by the termination.[2]

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[1]This deficiency is probably due to the fact that Respondent's private counsel of ten years standing below, was superseded by the Attorney General's Office in the 30 day interval between denial of rehearing below and petition for certiorari.

[2]Respondent implies that the purpose of the Government in terminating was not to turn over the plant to the Bureau of Mines. (Brief, p. 3 footnote 4.) This is contrary to the record fact. (Exhibit B-F), and the fact the plant was turned over to the Bureau of Mines. This use of a pilot plant designed solely for the commercial testing of Petitioner's process, commencing about a year after the court action was filed, is relevant evidence of the reasonable amount *(quantum meruit)* of compensation justly due, as a result of Respondent's terminating the contract and thereafter the Government obtaining (we hope) all the benefits contemplated, when the contract was executed. If the Bureau of Mines' expenditure of $2,000,000 in the plant will free the nation from the Second World War's perilous dependence upon foreign bauxite to obtain alumina, it will be "cheap insurance", (Ex. 20, App. II, pp. 155, 173) even though the national economy is deprived of the process during these times of national defense. A public report of the Bureau's activities has never been made.

Respondent states (Brief, p. 12):

> ". . . the court *found* that Monolith's 'value of the contract' and 'quantum meruit' claim amounted to a claim for general damages . . . " (R. 298). Monolith does not controvert this *finding* . . ." (Italics added.)

This was not a "*finding*"; it is the Conclusion of Law, (R. 298) which petitioner has controverted at every stage of this case.

At page 6 of its Brief, Respondent asserts that Petitioner "submitted a new claim" at a pre-trial conference, quoting from the trial court's analysis of the complaint. However, at the critical point, it interpolates words of its own.

RFC's Quotation	*The Record, p. 256*
". . . (4) that (this 'value of contract') claim is for . . . an amount in excess of the seven or eight million dollars shown . . ."	". . . (4) That its claim is for the fair compensation to which it was entitled, including not only its reimbursables, but an amount in excess . . ."

Obviously, the trial court was at most analyzing one pleading and the principles of law applicable to the doctrine called "value of the contract" by the courts.

Respondent, when reciting the then known monetary allegations of Petitioner's complaint, (Brief, pp. 5-6) fails to advise the court that a ruling upon a cause of action for declaratory relief (Finding 21, R. 254) a year before the pre-trial had created the issue resulting in the question now before this court.

Petitioner's Reply may be summarized as follows:

(1) The Respondent confuses the distinction between claims, pleadings, evidence and applicable principles of substantive law;

(2) The trial court found, and the Court of Appeals affirmed, that Petitioner had exhausted the condition precedent of filing a claim and obtaining ex parte administrative findings;

(3) The trial court long before trial or pre-trial declared the law to be that "fair compensation" was limited to expenses (called reimbursables) only;

(4) One of the questions presented here is the correctness of this legal conclusion as Respondent admits;

(5) All the applicable cases hold that "compensation" must take into account factors other than mere expenses. Respondent has cited no case to the contrary;

(6) Respondent acknowledges the importance of the question, and the appropriateness of certiorari, by admitting it will seek certiorari itself.

Respondent has misstated material facts and confuses the distinction between claims, pleadings, evidence, and substantive law. Words are fluid tools. Many words are susceptible of ambiguity and multiple senses, due to the imperfections of language. The word "claim", upon which Respondent builds its

argument, is such a word. Respondent equates "claim" with legal principles or "theory of recovery" relied upon to justify a "claim". They are obviously not the same. Constant repetition cannot convert a principle of law into claim, a complaint, or the evidence to support a claim or complaint.[3]

Respondent's reliance (Brief, pp. 2, 8-11) upon an asserted non-exhaustion of an ex parte administrative remedy, is not supported by the record. Respondent's only applicable regulation provides: "Contractors may present their settlement proposals on any basis which would result in their receiving fair compensation for the termination . . ." The trial court found as a fact concerning Petitioner's claims: "24. Monolith has exhausted its administrative procedure under the Contract Settlement Act. It duly filed its claim with the RFC, and findings and determinations were made by the RFC." (R. 255)

On January 16, 1950, in a comprehensive document, Petitioner recited the history of this litigation to that date and then stated: "Monolith therefore is here and now taking every step which could be in anywise contemplated by either the War Mobilization Act or the Contract Settlement Act as a preliminary to the ultimate, possibly needed institution of the litigation

[3]Representative quotations from Respondent's Brief: ". . . review a claim" (p. 9); ". . . this claim . . ." (p. 9); "petitioner's claim" (p. 9); "this new claim" (p. 10); "on a claim the administrative body has never been given an opportunity to consider." (p. 10); "this claim" (p. 10); "increase its complaint to include this claim" (p. 10); "its 85 million dollar claim" (p. 10); "the claim" (p. 11); "'value of contract' and '*quantum meruit*' claim" (p. 13).

contemplated by the Contract Settlement Act in the event of Monolith's aggrievement with findings made by Reconstruction Finance Corporation or by its refusal to make findings." (Exhibit N, pp. 7-14)

Thereafter, Petitioner recited all claims known to it, including monetary claims for expenditures made in creating the pilot plant, costs of completing it, operating it and in the event the existing plant was not made available, the cost of constructing a new plant, which total sum Respondent admits is $10,000,000. Petitioner requested findings, notified Respondent that all its records were available, and stated it was willing to make any reasonable change in the form of these claims or to comply with any request to make the claims more definite and certain.

Congress provided in Section 20(f) of the Contract Settlement Act, "Any contracting agency may authorize or direct its officers and employees, as a part of their official duties, to advise, aid, and assist war contractors in preparing and presenting termination claims, ..."

Section 20(e) of the Act provides: "Nothing in this Act shall be deemed to impair or modify any war contract or any term or provision of any war contract or any assignment of any claim under a war contract, without the consent of the parties thereto, if the war contract, or the term, provision, or assignment thereof, is otherwise valid."

By its January 22, 1951 Opinion, almost two years before trial and one year before the pre-trial referred to by Respondent (Brief, p. 6), the court "declared the law" as to the meaning of "fair compensation" under the Act (95 F. Supp. 570, R. 88-106) pursuant to Petitioner's cause of action for declaratory relief.

The court there struck all allegations upon monetary claims except Petitioner's expenses (called reimbursables) incurred in creating the experimental pilot plant. (R. 106). Petitioner has continuously preserved this error (R. 323-324, Petition p. 2) and Respondent's references to the trial court's opinion after trial merely confirm the existence of this error.

Thus, Respondent's assertion that ex parte administrative findings were not exhausted and its reference to the $85,000,000 profits established by the evidence, disclosing the enormous profits made in the aluminum industry and the potential of Petitioner's patented process, should not prejudice clarification of the real questions presented. Respondent acknowledges the unsoundness of such a position when it assumes the condition precedent of presenting a claim and obtaining findings thereon, had occurred. (Brief, p. 2). What Petitioner sought below and was denied *as a matter of law*, was a ruling that the trier of fact must take into consideration when fixing the amount of compensation, evidence of the "value of the contract" as well as "costs of testing the process", profits and all other factors.

Respondent equivocates on this point by asserting that just compensation "does not include an *allowance* for anticipatory profits". (Brief, p. 13). What Petitioner contends is, in the words of this Court:

> ". . . the fact that the contract, if carried out, would be profitable is one of the circumstances . . . which . . . must be given its proper weight in fixing just compensation. But that is very different from an *allowance* of anticipated profits . . ." (*De Laval Steam Turbine Co. v. United States,* 284 U.S. 61, 72 (1931)).

None of the cases, including the *Russell* case, cited by Respondent are to the contrary. Indeed the decisions of this Court have frequently approved consideration of the "value of the contract" as an element in fixing compensation. (*Russell Motor Car Co. v. United States,* 261 U.S. 514, 1923; *Brooks-Scanlon Corporation v. United States,* 265 U.S. 106, 1924). The *College Point Boat Corporation* decision of this Court and the three Court of Claims decisions cited by Respondent (Brief, p. 13) distinguish "anticipated profits" as did this Court in the *De Laval Steam Turbine Co.* decision above quoted.

Respondent, the Government's financial agent in this transaction, disputes Petitioner's rights were "taken" by the termination with the intent to substi-

tute Bureau of Mines operation, (Brief, p. 12), but refuses to meet Petitioner's authority on this point.[4]

Respondent contends that Congress limited the historically judicial function of determining "compensation" by enumerating certain administrative standards in Section 6(d) of the Act. The Act required the agencies to take certain profits and the contract price (obviously production contracts) into consideration. Congress when identifying these standards introduces them with the words "taking into account . . ." followed by the enumeration of the standards. Other provisions of Section 6(d) and 6(b) require the agencies to apply other methods and standards if these will not result in fair compensation. Clearly, when Congress provided in Section 13(b) that an action could be brought "in a court of competent jurisdiction" "in accordance with existing law" and directed judgment be entered "on the basis of the law and facts," it intended that the usual rules of evidence and criteria for determining compensation should be applied, since every reported decision so holds. (Petition, p. 25)

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[4]The trial court apparently labored under the misapprehension that the RFC had not "taken" any thing of Monolith's and therefore the rules for determining compensation announced by the Supreme Court did not apply. (128 F. Supp. 824, 842). This was erroneous as a matter of law. In *United States v. General Motors Corporation*, 323 U.S. 373 (1944) the court clarified the meaning of a "taking" when it said: (p. 378)

> "In its primary meaning the term 'taken' would seem to signify something more than destruction, for it might well be claimed that one does not take what he destroys. But the construction of the phrase has not been so narrow. The courts have held that the deprivation of the former owner rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." (Petition, p. 19)

CONCLUSION

The court below remanded for jury trial. It erred in ruling that the trial court correctly limited the issues when declaring that Petitioner's compensation was limited to reimbursables only as a matter of law. This ruling is in conflict with the criteria for determining compensation laid down by this court in over 100 years of decisions. The ever increasing national defense program involving the contractual integrity of governmental agencies, necessitates a ruling by this court upon the admissible evidence to be considered when determining compensation. For the reasons stated in the Petition and the fact Respondent intends to petition for hearing, Petitioner prays its petition be granted.

Dated, June 7, 1957.

Respectfully submitted,

ENRIGHT & ELLIOTT
Of Counsel